Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-849

SMITH'S FOOD KING, a corporation,

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 1442, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner Smith's Food King respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on August 17, 1979.

Opinion Below.

The decision of the Court of Appeals, not yet reported in the Official Reports, is printed in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 17, 1979. A timely petition for rehearing was denied on September 4, 1979,

and this Petition for Certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented.

When an action is commenced by an employer to compel a union to arbitrate the issue of whether its threat to strike violates a no strike clause in a collective bargaining agreement and the strike threat is later revoked, what standard should be applied to determine if the case has become moot?

Constitutional Provision Involved.

The pertinent part of Article III, Section 2 of the Constitution is set forth in the Appendix hereto.

Statement of the Case.

Smith's Food King, the petitioner herein, owns and operates retail supermarkets located throughout the County of Los Angeles, California and elsewhere. (R. 10.)[1]

Retail Clerks Union, Local 1442, the respondent herein, is an unincorporated association functioning as a labor union and is the collective bargaining representative of Smith's Food King employees working as retail clerks in those supermarkets within the Union's jurisdiction. (R. 10.)

Petitioner and respondent are parties to a collective bargaining agreement providing for and establishing the wages, hours, benefits and conditions of employment for the retail clerks employed by the petitioner and represented by the respondent. (R. 11.)

[1]"R" references are to the record in the District Court reproduced as "Volume I, Pleadings."

The agreement contains an arbitration provision which establishes the method for resolving disputes that arise between Smith's and the Union. That provision provides, in pertinent part, that "[a]ny and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of [the] Agreement" will be submitted to arbitration. (Article XIV(A); R. 38.) The agreement also provides that the decision of an arbitrator shall be final and binding upon the parties, "subject only to their rights under law." (Article XIV(C)(4); R. 39.)

The agreement also contains a "no-strike" clause, which provides as follows:

> "2. Work Stoppages. Matters subject to the procedures of this Article shall be settled and resolved in the manner provided herein. During the term of this Agreement, there shall be no cessation or stoppage of work, lockout, picketing or boycotts, except that this limitation shall not be binding upon either party hereto if the other party refuses to perform any obligation under this Article or refuses or fails to abide by, accept or perform a decision or award of an arbitrator or board." (R. 39.)

In February, 1975, a dispute arose between Smith's and the Union concerning the alleged performance of the Union's bargaining unit work by non-bargaining unit personnel.

In June, 1976, that dispute was submitted to arbitration pursuant to the terms of the Agreement. The decision and award of Arbitrator Meyers, issued on October 27, 1976, was in the Union's favor.

Smith's had argued to the arbitrator that the contract clause relied upon by the Union in support of its grievance was an illegal liquidated damages clause under Section 1670 of the California Civil Code and was, therefore, unenforceable and void. (R. 72.)

Smith's moved to vacate the decision and award of the arbitrator in the Los Angeles Superior Court in May, 1977. When Smith's motion was denied, a timely appeal from the decision of the Superior Court was filed in the California Court of Appeal. (R. 62.)

On June 16, 1977, after the decision of the Superior Court was issued and before an appeal was filed with the California Court of Appeal, the President of the respondent Union sent a letter to the representative of Smith's. The letter declared that Smiths' Food King was in violation of Article XIV, Section D, Paragraph 2 of the Agreement by refusing to comply with the award of arbitrator Meyers. The Union President threatened to strike Smith's Food King stores if the arbitrator's award was not complied with within 48 hours of the receipt of the letter. (R. 86.)

Smith's representative responded to the Union's letter with a telegram explaining that it was the position of Smith's that Article XIV(D)(2) of the Agreement was not meant to interfere with an employer's right to seek judicial review of an arbitrator's award. The telegram demanded that the Union submit its dispute to arbitration. (R. 87.) The Union refused. (R. 16.)

When the Union refused to halt its threatened strike and submit the dispute to arbitration, Smith's filed a complaint for injunctive relief and for specific performance of the Union's agreement to arbitrate all disputes in the Los Angeles Superior Court.

Several days later, the Union filed a petition for removal in the United States District Court, Central District of California, removing the action filed by Smith's for injunctive relief and for specific performance of agreement to arbitrate to that court. (R. 1.) Removal jurisdiction was based upon the fact that federal courts have original jurisdiction over actions arising under Section 301 of the National Labor Relations Act as amended, 29 U.S.C. §185 *et seq.*

On removal to the District Court, Smith's motion for a preliminary injunction was denied and the Union's motion to dismiss Smith's complaint was granted (R. 199), thus rejecting Smith's request for an order compelling arbitration. In order to avoid a strike, Smith's complied with the arbitrator's award, paying all monies required by the award. Smith's also filed an appeal with the Ninth Circuit Court of Appeals.

While Smith's appeal to the Ninth Circuit was pending, and before oral agreement, the decision of the California Court of Appeal issued, reversing the decision of the Los Angeles Superior Court and vacating the decision and award of arbitrator Meyers to the extent that it violated Section 1670 of the California Civil Code.

Holding that ". . . the grievance, the arbitration, and the threatened strike have all been resolved, and no decision of this court could alter the rights of any party," the Ninth Circuit dismissed the petitioner's appeal as moot (Memorandum Decision; Appendix A).

REASONS FOR GRANTING THE WRIT.

The Ninth Circuit's Decision in this case raises the substantial question of what standard the federal courts should use to determine when an action to compel arbitration pursuant to an arbitration clause in a collective bargaining agreement becomes moot. The petitioner contends that the standard adopted by the court below is in direct conflict with the federal labor policy favoring arbitration and with the guidelines issued by this Court for determining whether a matter between an employer and a union should be ordered arbitrated.

The guidelines for determining whether a matter should be submitted to arbitration have been emphatically articulated by this Court in the so-called "*Steelworkers*" trilogy: *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 80 S.Ct. 1347 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960):

In *United Steelworkers of America v. American Manufacturing Co., supra,* the Supreme Court stated:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. . .
>
> "The courts, therefore, have no business weighing the merits of the grievance [fn.], considering whether there is equity in a particular claim, or determining whether there is particular claim, or

> determining whether there is particular language in the written instrument which will support the claim. . . . The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." *Id.*, at 567-568 (fn. omitted).

In *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra,* the Court said at 582-583:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. [Fn.]"

And again at 585:

> "[W]e think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator."

Despite these admonitions, the Ninth Circuit found the Petitioner's demand for arbitration moot because the incident which had given rise to its demand, *viz.*, an earlier arbitration and a strike threat, had been

resolved. Rather than look to the language of the arbitration agreement between the parties to determine the legitimacy of the petitioner's claim that the meaing of the no strike clause must be submitted to arbitration, the Court looked to factors external to the collective bargaining agreement and decided that such a determination by an arbitrator was no longer needed and that the case had become moot while on appeal.

A proper analysis of the issue of whether a case or controversy exists, however, rests not on what a court perceives to be the needs of the parties, but rather on the contractual commitments of the parties to one another.

The arbitration clause between these parties is quite broad and inclusive and provides, in pertinent part, that "[a]ny and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of [the] Agreement" will be submitted to arbitration. (Article XIV(A); R. 38.)

It is quite true that the Union's threat to strike to gain compliance with an earlier arbitration award caused the petitioner to demand that the respondent's and the petitioner's different interpretation of the no strike clause be submitted to arbitration. It is equally true that the union retreated from its strike threat while this case was pending before the Ninth Circuit. Rather than apply the "case or controversy" test to each of these incidents separately to determine whether either the issue of the petitioner's right to injunctive relief or the issue of the petitioner's right to arbitration had become moot, the Ninth Circuit intertwined both incidents to determine its jurisdiction.

The fact that the strike threat may have ended has no bearing on whether the collective bargaining agreement requires that the issue involved in the interpretation of the no strike clause be submitted to arbitration. The obligation of the Union to submit that dispute to arbitration is governed solely by the language of the arbitration clause in the contract between the parties. External events, here the Union's revocation of its strike threat, which may make moot a request for injunctive relief, do not affect a party's contractual obligation unless the contract so provides.

By ruling that the petitioner's demand for arbitration was moot because the threat to strike was revoked, the Court ignored the possibility that arbitration may be available to this and other employers to provide declaratory and interpretative statements of collective bargaining language, even when a particular dispute is resolved but an underlying disagreement remains.

The Ninth Circuit's view that its jurisdiction to review an employer's right to arbitrate issues arising under a collective bargaining agreement is dependent upon external factors rather than on the language of the arbitration agreement severely affects the integrity of such agreements.

In fact, the very vitality of this Court's decision in *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 90 S.Ct. 1583 (1970), permitting federal courts to issue injunctions to restrain strikes that are in violation of no strike agreements, is threatened by the decision that the instant case has become moot. If the Ninth Circuit's decision is not reviewed by this Court, labor unions throughout the United States can threaten strikes, which they will claim do

not violate no strike clauses, in order to have their way in disputes with employers. After an employer has conceded in the face of such industrial blackmail, these unions may revoke their threats to violate a no strike clause and then claim that any employer demands that these threats be arbitrated have become moot. Such actions threaten the durability of *Boys Market,* the *ratio decidendi* for which was later described by this court as the imperative "to implement the strong congressional preference for the private dispute mechanisms agreed upon by the parties." *Buffalo Forge v. United Steelworkers of America,* 428 U.S. 397, 407, 96 S.Ct. 3141, 3147 (1976). If a union is permitted to escape judicial review of its conduct by forcing an employer to concede important issues to it and then claiming that the arbitrability of such conduct has become moot, there will be no reason for an employer to agree to include arbitration clauses in collective bargaining agreements.

The issue presented to this court, therefore, is what standard should the federal courts use to determine if a demand for arbitration over the meaning of a no strike clause has become moot. Should a court be guided by the current status of a union's threat to violate a no strike clause to determine if a demand to arbitrate the legality of such a threat presents a "case or controversy" within the meaning of Article III of the Constitution? Or should the existence of a "case or controversy" be determined by examining the language of the arbitration clause in the collective bargaining agreement between the parties for the purpose of determining whether the clause is susceptible to an interpretation which would present an arbitrable issue between the parties?

The Petitioner contends that the latter standard is the correct one and that this court, in the exercise of its supervisory powers over the federal judiciary, should settle this important question of law.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Dated: November 30, 1979.

Respectfully submitted,

McLaughlin and Irvin,
Timothy F. Ryan,

Attorneys for Petitioner
Smith's Food King.

APPENDIX.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

Smith's Food King, a corporation, Appellant, v. Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO, an unincorporated association; Doe Individual One through Doe Individual Five Hundred; and Doe Association One through Doe Association Ten (inclusive of all intervening numbers as though each Doe were separately and severally designated), Appellees. No. 77-3377.

Filed Aug. 2, 1979.

Appeal from the United States District Court for the Central District of California.

Before: BROWNING and GOODWIN, Circuit Judges, and EAST*, District Judge.

The grievance, the arbitration, and the threatened strike have all been resolved, and no decision of this court could alter the rights of any party. The case does not fall within the guidelines of *Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237, 1238 n.1 (9th Cir.), *cert. denied*, 434 U.S. 837 (1977).

The appeal is dismissed as moot.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Article III, Section 2 of the Constitution.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.